Filed 10/20/16 P. v. Pargas CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. AGUSTIN PARGAS, Defendant and Appellant.	B264612 (Los Angeles County Super. Ct. No. GA091922)

APPEAL from an order of the Superior Court of Los Angeles County, Jared D. Moses, Judge. Affirmed.

James Koester, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Mary Sanchez and Margaret E. Maxwell, Deputy Attorneys General, for Plaintiff and Respondent.

Agustin Pargas appeals from an order denying his motion for resentencing pursuant to Proposition 47. Pargas is serving a sentence which includes two 1-year enhancements for prior prison terms on felonies that have now been designated misdemeanors. Should the trial court have vacated the one-year enhancements now that the felonies have been designated misdemeanors? The issue raises the question whether Proposition 47 is retroactive. We hold that Proposition 47 is not retroactive and affirm the order of the trial court.[1]

FACTUAL AND PROCEDURAL SUMMARY

The information filed February 20, 2014, alleges that Pargas committed two felony drug offenses, neither of which was later affected by Proposition 47. The information also alleges, pursuant to section 667.5, subdivision (b), that Pargas had sustained two prior felony convictions for which he served separate prison terms. On June 2, 2014, Pargas pled no contest to counts 1 and 2 of the information and admitted the prior prison term allegations.

The court sentenced Pargas to prison for a total of six years eight months. The sentence included two 1-year sentencing enhancements based on prior prison terms Pargas served for two prior felony convictions, both of which have since been designated misdemeanors pursuant to Proposition 47.

On May 19, 2015, pursuant to a petition filed under Proposition 47, the trial court designated one of the prior felony convictions a misdemeanor. (The other prior felony conviction, the subject of a petition before another court, was subsequently designated as well.) However, the trial court denied Pargas's motion for resentencing, concluding that because Pargas had completely served his prior prison terms before he committed the present offenses, the prior prison term enhancements remained valid. As to the one prior felony conviction it designated a misdemeanor, the trial court ruled the designation pursuant to Proposition 47 does not have retroactive effect.

---

[1] Unless otherwise indicated, all section references are to the Penal Code.

ISSUE

Did the trial court erroneously fail to vacate the prior prison term enhancement based on a felony conviction now deemed a misdemeanor under Proposition 47? The answer is no.

DISCUSSION

The Safe Neighborhoods and Schools Act, enacted by the electorate as Proposition 47, reduces certain felonies and wobblers to misdemeanors and permits persons convicted of those felonies and wobblers to be resentenced. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091.)

Section 1170.18 identifies two ways a defendant sentenced or placed on probation prior to Proposition 47's effective date can have his or her sentence reduced. First, pursuant to section 1170.18, subdivisions (a) and (b), a defendant may file a petition if she or he is currently serving a felony sentence for an enumerated offense. Second, if a defendant has completed his or her sentence for an enumerated offense, the defendant must file an application to secure the designation. (§ 1170.18, subds. (f) & (g); *People v. Shabazz* (2015) 237 Cal.App.4th 303, 308, 310-311.)

Section 1170.18, subdivision (k) states, "[a]ny felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) *shall be considered a misdemeanor for all purposes*, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm . . . ." (Italics added.)

Pargas argues the plain language of section 1170.18, subdivision (k) required the trial court to recall his sentence and resentence him without the enhancement. Additionally, in support of his argument he relies on the firearm exception in subdivision (k), the purposes of Proposition 47, and the rule of lenity. He concedes *People v. Carrea* (2016) 244 Cal.App.4th 966, review granted April 27, 2016, S233011, *People v. Ruff* (2016) 244 Cal.App.4th 935, review granted May 11, 2016, S233201, and *People v.*

Valenzuela (2016) 244 Cal.App.4th 692, review granted March 30, 2016, S232900, have rejected similar arguments.[2]

Proposition 47 itself does not expressly state whether designation of a felony as a misdemeanor has retroactive effect. Section 1170.18 identifies two ways a defendant can benefit from the statute: (1) section 1170.18, subdivisions (a) and (b), which provide for recall and resentencing where a defendant is currently serving a sentence for an enumerated felony subject to designation as a misdemeanor; and (2) section 1170.18, subdivisions (f) and (g), which provide for designation of the felony as a misdemeanor where a defendant has completed his or her sentence. Pargas fits neither of these two categories: he is currently serving a sentence for ineligible felonies; only the felonies underlying his prior prison term sentencing enhancements have been designated misdemeanors.

The statute is also silent as to whether an inmate can obtain resentencing because a sentencing enhancement for a prior prison term is based on a felony now designated a misdemeanor. However, the statute includes the following provision in section 1170.18, subdivision (n): "Nothing in this and related sections is intended to diminish or abrogate the finality of judgments in any case not falling within the purview of this act." Creating a new, third category of relief to permit recall of sentencing enhancements would contravene this provision.

Pargas points out that section 1170.18, subdivision (k) specifically states that a felony, once designated, "shall be considered a misdemeanor for all purposes." We look to section 17, an analogous statute which permits a court in its discretion to sentence "wobblers" as misdemeanors. Both section 17, subdivision (b)(3) and section 1170.18, subdivision (k) state a felony conviction designated a misdemeanor "shall be considered a misdemeanor for all purposes." This phrase in section 17, subdivision (b)(3) has been interpreted to apply prospectively only. (*People v. Feyrer* (2010) 48 Cal.4th 426, 439;

---

[2] The issue is also pending before our Supreme Court in *People v. Williams* (2016) 245 Cal.App.4th 458, review granted May 11, 2016, S233539.

People v. Marshall (1991) 227 Cal.App.3d 502, 504 [redesignated offense is treated as a misdemeanor *after* redesignation].) Thus, imposition of a sentencing enhancement based on a felony later reduced to a misdemeanor is not called into question. (*People v. Park* (2013) 56 Cal.4th 782, 802.)

"[I]dentical language appearing in separate statutory provisions should receive the same interpretation when the statute covers the same or analogous subject matter." (*People v. Cornett* (2012) 53 Cal.4th 1261, 1269, fn. 6.) Here Proposition 47 and section 17 address the same subject matter: the sentencing effect to be accorded designation of a felony as a misdemeanor. We therefore give the language in Proposition 47 the same prospective-only effect our courts have given to section 17.

Pargas next argues that Proposition 47 provides that it shall be construed liberally to effectuate its purposes. (See Voter Information Guide, Gen. Elec. (Nov.4, 2014) text of Prop. 47, § 18, p. 74.) However, our Supreme Court has clearly stated that " 'the legislative intent in favor of the retrospective operation of a statute cannot be implied from the mere fact that the statute is remedial and subject to the rule of liberal construction.' " (*DiGenova v. State Board of Education* (1962) 57 Cal.2d 167, 174.)

Pargas also argues that the firearm exception in section 1170.18, subdivision (k) implicitly excludes other exceptions, including an exception prohibiting retroactive effect. This argument is precluded by the fact that section 17 designations are also subject to express exceptions, yet section 17 is not applied retroactively.[3]

---

[3] *Alejandro N. v. Superior Court* (2015) 238 Cal.App.4th 1209, does not support Pargas's argument. *Alejandro N.* held, in relevant part, that when a juvenile court reduces a felony to a misdemeanor, the minor's DNA in the state's DNA data bank cannot be retained. (*Id*. at pp. 1217, 1226-1227, 1230.) Unlike the present case, *Alejandro N.* did not involve a recidivism enhancement. Instead, like the firearms exception, it involved a separate collateral consequence of a felony conviction, DNA collection, unrelated to sentencing.

Finally, the purposes of Proposition 47--ensuring prison spending is focused on violent and serious offenses, maximizing alternatives for nonserious, nonviolent crime, and investing savings into crime prevention and support programs--do not mandate giving designations retroactive effect. Proposition 47 is directed to offenders convicted of certain nonserious offenses. The voter's expressed intent was that "people convicted of murder, rape, and child molestation . . . not benefit from this act." (Voter Information Guide, *supra*, § 3, subd. (1), p. 70.) Applying Proposition 47 retroactively across the board to any enumerated felony used to support a prior prison term enhancement means that offenders convicted of and sentenced for violent crimes would also benefit. Retroactivity for sentencing enhancements thus directly conflicts with the voters' expressed intent.

We conclude that the trial court correctly found Proposition 47 not retroactive and correctly declined to vacate Pargas's prior prison term enhancement.[4]

[4] Because we decide to reach the merits, we have not addressed respondent's argument that the appeal should be dismissed.

DISPOSITION

The order denying the motion for resentencing is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

STRATTON, J.*

We concur:

EDMON, P. J.

LAVIN, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.